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In the

United States Supreme Court

October Term, ~~1960~~ 1961

No. ~~1000~~

MANUAL ENTERPRISES, INC.,
A body corporate

TRIM ENTERPRISES, INC.,
A body corporate

GRECIAN GUILD,
A body corporate

Petitioners,

v.

J. EDWARD DAY,
Postmaster General of the United States

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, Manual Enterprises, Inc., a body corporate, Trim Enterprises, Inc., a body corporate, Grecian Guild, a body corporate, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on March 23, 1961.

Citations to the Opinions Below

On March 23, 1961, the United States Court of Appeals for the District of Columbia Circuit, issued its decision and opinion affirming the granting of summary judgment in favor of respondent by the United States District Court for the District of Columbia on August 17, 1960, in Civil Action Number 1450-60. The case number in the United States Court of Appeals was 16,072 (A. 1a). Petitioners' magazines were judged obscene in violation of Title 18, U.S. Code Section 1461 (1958).

Jurisdictional Statement

The United States District Court for the District of Columbia had jurisdiction over this case. The decision and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered March 23, 1961. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254.

Statement of Questions Presented

1. Whether the petitioners' magazines are obscene within the literal meaning of Title 18, Section 1461 United States Code.

2. Whether the respondent, through the post office procedures, exercised an unconstitutional prior restraint upon petitioners' magazines in violation of the First Amendment to the Constitution of the United States of America.

3. Whether petitioners' magazines are obscene as containing advertisements of where, how, from whom and by what means obscene material may be obtained in violation of Title 18, Section 1461 United States Code, and if the petitioners' magazines were found to appeal to the prurient interests of homosexuals, whether petitioners' magazines would come under the protection of the First Amendment to the Constitution of the United States of America.

Statutes and Rules Involved

The pertinent statutes are:

Amendment I to the Constitution of the United States. (App. 5a)

Title 18 U.S. Code Section 1461 (1958). (App. 6a)

Statement of the Case

Petitioners are the publishers of three magazines, "Manual," "Trim" and "Grecian Guild Pictorial." On April 5, 1960 the General Counsel of the Post Office Department, ex parte, determined these three magazines to be obscene and non-mailable and withheld from transit through the mails 255 copies of the April, 1960 issue of "Manual," 75 copies of the May, 1960 issue of "Trim" and 75 copies of the May, 1960 issue of "Grecian Guild Pictorial." These magazines were held by the Postmaster in Alexandria, Virginia. Thereafter, petitioners forced the Post Office Department to hold a formal hearing on the question of whether or not these magazines were mailable. The General Counsel for the Post Office Department on April 14, 1960 filed a complaint with the Judicial Office of the Post Office Department alleging that the three magazines were obscene and non-mailable and also that the magazines contained advertisements where, how, and from whom obscene matter may be obtained and therefore were non-mailable. To expedite the administrative procedures, petitioners stipulated to waive the hearing before a Post Office Department Hearing Examiner and consented to the Post Office Department Judicial Officer presiding at the hearing. The hearing was held at the Post Office Department April 21, 1960 through April 25, 1960. The Post Office Department Judicial Officer agreed with the General Counsel of the Post Office Department and held the several issues of the petitioners' magazines to be obscene and non-mailable and further to be non-mailable as containing advertisements as to where, how, and from whom obscene materials could be obtained, all in violation of Title 18 U.S.C. Section 1461. At the Post Office Department hearing both parties produced psychiatrists and psychologists, all of whom agreed that petitioners' magazines would not appeal

to the prurient interest of the average members of the community. No witness was qualified as an expert on body building, physical therapy or physical culture and all admitted ignorance of these matters. The Post Office Department psychiatrist testified that different photographs in each of petitioners' magazines, along with a myriad of other every day stimuli, could appeal to the prurient interest of different types of homosexuals. He also admitted that the photographs in petitioners' magazines were less revealing than the totally nude photographs which appear in several issues of "Sunshine and Health" nudist magazine, and other magazines as "Playboy." The Post Office Department attempted to prove that petitioners' president had made statements that the three magazines at issue were sold to homosexuals. Further, the Post Office Department attempted to prove to its Post Office Department Judicial Officer that some of the photographers contributing to petitioners' magazines advertised where, how, and from whom obscene matter could be obtained. This was accomplished by introducing obscene photographs seized from the homes and offices of the different photographers, but not obscene photographs which were sold through the mails by the different photographers. The Postal Inspector testified that he had difficulty in purchasing any obscene photographs from any photographer listed in petitioners' magazines when responding to an advertisement from petitioners' magazines. He further testified that petitioners' president had offered to delete the works of any contributing photographer to petitioners' magazines upon being notified by the Postal Inspector that said photographer had been convicted of any criminal offense. There was no direct testimony concerning the method of distribution of petitioners' magazines. The Post Office Department Judicial Officer was unconcerned with what materials would constitute the contemporary community standards in the magazine field and would not permit examination of the psychiatrists as to the effect of other magazines, generally accepted in the community and comparable to petitioners' magazines at issue, upon other sexual deviates and particularly susceptible groups of readers. On April 28, 1960 the Post Office Department Judicial Officer rendered his Departmental Decision holding petitioners' magazines to be nonmailable and on May 13, 1960 petitioners filed their

Complaint and Motion for Preliminary Injunction in the United States District Court for the District of Columbia which resulted in that Court's Order granting summary judgment to the respondent on August 17, 1960 from wh ch an appeal was taken.

The United States Court of Appeals for the District of Columbia Circuit on March 23, 1961 entered its decision and opinion (A-1a) affirming the action of the United States District Court for the District of Columbia Circuit. Apparently the United States Court of Appeals did not consider, in reaching its decision herein, any of the decisions of this Court, following this Court's decision, Roth v. United States, 354 U.S. 476, applying the protection of the First Amendment to the Constitution of the United States of America to magazines similar and comparable to the petitioners' magazines.

Reasons for Allowing the Writ

Point One

Whether the Petitioners' Magazines Are Obscene Within the Literal Meaning of Title 18, Section 1461, United States Code

So far as issues Number 1 and 2 are concerned, the statutory and constitutional questions coalesce. This Court in Roth v. United States, 354 U.S. 476, sustained pertinent Code Section 18 U.S. Code 1461, prior to its Amendment, on the ground that obscenity lies outside the protection of the constitutional guarantees of the First Amendment. The Court, in that case, thoroughly defined "obscenity." The ambit of the statute, then, cannot constitutionally be broader than the Court's definition of obscenity. Of course, the statute is to be interpreted as broadly as the Constitution allows. In the administrative hearing before the Post Office Judicial Officer, it was the magazines on trial. The affidavit of Herman L. Womack, in support of the motion for temporary injunction herein, must be considered in relation to the transcript of the proceedings held at the Post Office. In the Roth case, the Court defined obscenity in terms of what it is, and in terms of what it is not. The expression of ideas that have the "slightest redeeming social importance" was

held by this Court to be constitutionally protected. To be obscene, therefore, these magazines must be empty of any ideas of even the slightest redeeming social importance. This Court must conclude that physique magazines, also popularly termed body building magazines, have significant social importance to a large segment of the population of the United States. This Court in Sunshine Book v. Summerfield, 355 U.S. 372, and in Mounce v. United States, 355 U.S. 180, and in One, Inc. v. Oleson, 355 U.S. 371, has cited the Roth decision as its basis for reversing the lower courts and protecting ideas contrary to the prevailing climate of public opinion. In the Roth decision, the prior law laid down in Regina v. Hicklin, L.R. 3, Q.B. 360, was discarded, and the test is no longer that which the Post Office argued through the Judicial Officer, i.e., that these magazines would appeal to the prurient interest of a particularly susceptible group. No one is able to assert with definiteness whether or not purchasers of these magazines are exclusively members of a particularly susceptible group, i.e., homosexuals, as set forth in the uncontradicted affidavit of Herman L. Womack. Petitioners argue that these magazines must be judged according to their effects upon normal, healthy adults having applied contemporary community standards. The Post Office Department does not allow for a dissent in matters of taste. Petitioners' magazines are constitutionally protected even if they could be considered as hateful to the prevailing climate of public opinion; the Roth case held that they would still have the constitutional protection of the First Amendment. This Court's negation of the Hicklin rule surely does not mean that a Gallup Poll must be conducted nor may we consider the possible effect upon children or emotionally disturbed readers, illiterates, etc. If these magazines would not appeal to the prurient interest of an average, normal, adult they are not obscene and are constitutionally protected. Photographs portrayed in these magazines are not better, and no worse than those portrayed in such leading magazines as Esquire, Gentry, Rogue, Duke, and Playboy magazines which the Post Office would not dare to argue are obscene. A salacious reader who might purchase one of petitioners' magazines from a book store is more likely to feel cheated than excited. But the effect of these magazines on such erratic or abnormal readers does not set the constitutional limit on freedom of

speech and press. At the hearing before the Post Office Department Judicial Officer, counsel for the Post Office Department urged that the intent of the publisher should control. Actually, the intent of the publisher is irrelevant herein, because it is the magazines themselves which the Court must base its decision upon, surrounding circumstances being irrelevant.

Point Two

Whether the Respondent, Through the Post Office Procedures, Exercised an Unconstitutional Prior Restraint Upon Petitioners' Magazines In Violation of the First Amendment to the Constitution of the United States of America

Referring to the second point, petitioners assert that the administrative procedure followed by the Post Office, based upon a criminal statute, raises doubts of constitutionality. The fragile foundation on which the Post Office action rests must be kept in mind, both in dealing with the substantive obscenity question involved and in determining the proper scope of judicial review. It is the duty of the Courts to defend substantive constitutional rights especially when attacked from a source itself of doubtful constitutional validity. There is lacking here the kind of specific legislative direction to the administrative agency that in certain circumstances justifies judicial deference to administrative determinations. It is the magazines before this Court that are on trial, not the publishers, although the Post Office has taken the contrary view, by attempting to unconstitutionally prohibit from the mails any magazine in which Herman L. Womack has any interest.

The Post Office Department conducted an unconstitutional prior restraint on these magazines. It first held the magazines to be non-mailable without notice or hearing allowed the publishers and deprived the petitioners of the use of the mails. After pressure exerted by the United States District Court, at the instance of the petitioners, the Post Office Department held a time-consuming hearing, the product of which was an Order contrary to the established law of the United States, which Order based upon the grounds given could have been propounded without any hearing at all.

This amounts to the most obnoxious and unconstitutional censorship. The principal effect of the administrative hearing at the Post Office Department is to delay action of the Courts; it is no more than me arguing with myself over what I had already decided to do. The Judicial Officer of the Post Office could not possibly qualify as an administrative expert. Petitioners assert that the Post Office Department has conducted an ex parte administrative prior restraint treading upon an area of constitutional sensitivity apart from the substantive problems of determining whether or not the magazines are obscene.

Point Three

Whether Petitioners' Magazines Are Obscene As Containing Advertisements of Where, How, From Whom and By What Means Obscene Material May Be Obtained In Violation of Title 18, Section 1461, United States Code, And If the Petitioners' Magazines Were Found to Appeal to the Prurient Interests of Homosexuals, Whether Petitioners' Magazines Would Come Under the Protection of the First Amendment to the Constitution of the United States of America

Referring to the third point of this argument upon consideration of the decision of this Court in Smith v. California, 361 U.S. 147, it is clear that no publisher is responsible for the unknown actions of its advertisers any more than any book dealer is responsible for the contents of books for sale from his shelf of which he knows not the content. In all cases arising under Title 18, Section 1461, U.S. Code, as set forth in his concurring opinion in the Roth case, by Chief Justice Warren, page 495, the important element is that these things be done knowingly. There is no evidence that petitioners knew any contributing photographer was advertising obscene matter but rather the evidence showed that petitioners tried to avoid such contributing photographers by following the same procedures of sending "Test letters" as used by the Post Office Inspectors.

In its decision and opinion of March 23, 1961, the United States Court of Appeals for the District of Columbia Circuit apparently gave no consideration to the decisions of this

Court following this Court's decision in Roth v. United States, 354 U.S. 476. Petitioner cited to that Court in petitioners' brief, and argued, the decisions of this Court rendered in Sunshine Book v. Summerfield, 355 U.S. 372; Mounce v. United States, 355 U.S. 180; One, Inc. v. Oleson, 355 U.S. 371. Apparently, because this Court's decisions in those three cases consisted merely of granting of writ of certiorari and reversing upon the basis of Roth v. United States, 354 U.S. 476, the interpretation placed upon this Court's decisions by the Post Office Department, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, is that no one knows what this Court intended to do in those three decisions. Petitioners have argued, at all three hearings below, that this Court through its decisions intended that all ideas, containing even the slightest amount of socially redeeming value, are constitutionally protected, even though said ideas may be contrary to prevailing public opinion. This is the only reasonable interpretation that the petitioners could give to this Court's three decisions. However, the Courts below apparently preferred to sidestep these decisions. If this Court did not in its decision in One, Inc. v. Oleson, 355 U.S. 371, intend that ideas of a minority group, such as homosexuals, are constitutionally protected, then petitioners urge this Court to deny this petition for writ of certiorari. However, if this Court, in its decision in One, Inc. v. Oleson, 355 U.S. 371, intended to apply the constitutional protection of the First Amendment to the ideas of minority groups, even though such ideas are distasteful to the majority opinion, then petitioners urge this Court to grant a writ of certiorari in this case, so that the Courts below, throughout the United States, shall consider said decision of this Court and apply same, in fundamental determinations of obscenity, or non-obscenity, of questioned materials.

Petitioners urge this Court to clarify this all-important constitutional question. Petitioners' magazines are physique magazines. The United States Court of Appeals for the District of Columbia Circuit recognized this feature in its opinion. Admittedly, by number, the persons interested in body building are a minority group. Petitioners interpret this Court's decisions to intend that such a minority group as body builders have a constitutional right to receive their

magazines through the United States mails, regardless of what effect physique magazines might have upon another minority group, such as homosexuals. Even among homosexuals there is a myriad of every day stimuli, which would arouse the prurient interests of said homosexuals, while the same stimuli will have no effect on other homosexuals. No witness is qualified to testify as to what features of each of petitioners' magazines would appeal to the majority of homosexuals, even if the witness knew with certainty the people who purchased petitioners' magazines. Petitioners' magazines, nationally distributed in the same manner as any other major magazine is distributed, sell to over 40,000 purchasers per month. These sales are made through news stands and book stores. Based thereon, who is qualified to say with certainty that 39,000 purchasers of petitioners' magazines are homosexuals and 1,000 are persons having an interest in body building; the converse, petitioners argue, could equally be true.

Conclusion

Petitioners assert to the Court that the magazines in question are not obscene and that the Post Office Department is in error when it asserts that these magazines are obscene as appealing to the prurient interests of the average viewer, a homosexual. These magazines are distributed through the mails to news-stands and bookstores where they are offered to the public for purchase. It is impossible for anyone to establish the sexual habits of the numerous purchasers. It can be as readily assumed that all purchasers of these magazines are persons having an interest in the body building features contained in these magazines. However, even if these magazines were intended for homosexuals, which petitioners do not admit, they would still be constitutionally protected as such. Surely a magazine such as "One, Magazine" which states on its cover that it is beamed at homosexuals, would appeal to the prurient interests of its average viewer, so by comparison, these magazines, if tested by this Court's definition, cannot be held to be obscene. Every magazine of consequence, distributed nationally, uses the same method of distribution employed by the petitioners. If our literature is to be judged by the standards used in the Post Office Department, we are relegated to reading material

which would not appeal to the prurient interest of any particularly susceptible group, including children. Carried to its extreme, this would bar any reading material other than "Mother Goose Rhymes." There are so many different fetishes in existence that any photographic magazine would be subjected to condemnation. This, petitioners argue, the Courts should not allow. Petitioners urge this Court, upon consideration of all of the points raised in this Petition, to grant the writ prayed and to reverse the judgment of the Court below.

Respectfully submitted,

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[Filed Mar. 23, 1961]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 16,072 September Term, 1960.

Manual Enterprises, Inc., et al.,
Appellants,
v.
J. Edward Day,
Postmaster General,
Appellee.

Civil 1450-60

Appeal from the United States District Court for the District of Columbia.

Before: Fahy, Danaher and Bastian, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Bastian.

Dated Mar. 23, 1961

Circuit Judge Fahy concurs in the result.

DECISION

Dated March 23, 1961

Mr. Stanley M. Dietz for appellants.

Mr. Donald Smith, Assistant United States Attorney with whom **Messrs. Oliver Gasch**, United States Attorney, and **Carl W. Belcher**, Assistant United States Attorney, were on the brief, for appellee. **Mr. Frank Q. Nebeker**, Assistant United States Attorney, also entered an appearance for appellee.

Before FAHY, DANAHER and BASTIAN, Circuit Judges.

BASTIAN, **Circuit Judge**. In April, 1960 postal officials determined that three magazines, "Manual," "Trim," and "Grecian Guild Pictorial," (hereinafter referred to as appellants), were non-mailable under 18 U.S.C. par. 1461 as being obscene and as conveying information as to how and where obscene matter might be obtained. Pursuant to this determination, copies of the magazines were withheld from dispatch. Shortly thereafter an administrative hearing was conducted, in which appellants participated, which ended adversely to appellants. Suit for injunctive relief was then filed in District Court. Appellants' motion for preliminary injunction was denied. On cross-motions for summary judgment, appellants' was denied, and appellee's was granted. This appeal followed.

The magazines in question are physique magazines, composed almost exclusively of photographs of nearly nude male models. Each photograph is accompanied by a brief caption giving the names of the model and photographer. Each issue also contains an index listing the photographers who have contributed to that magazine and a few advertisements from photographers and studios offering collections of nude photographs.

At the administrative hearing psychiatrists testified in great detail, explaining how and why the poses used in most of the pictures and the clothing worn by the models would arouse great prurient interest in homosexuals. Psychiatric testimony was also given to the effect that certain objects (swords and chains) used in some of the pictures were primary symbols of sexual fantasies of deviates within the homosexual group.

A postal inspector testified that, using an assumed name, he submitted orders to some of appellants' advertisers and received from them photographs of nude males with the pubic area exposed to view. He further testified that, in his experience, additional orders would produce photographs progressively more lascivious. Investigations at the studios which mailed the particular photographs here involved resulted in the discovery of what was termed "hard core pornography," photographs of groups of nude males engaged in homosexual activities.

Appellants contend that these magazines are body-building magazines, and that the publishers have no way of knowing whether newsstand sales are made to homosexuals or body-building enthusiasts. They further contend that they can not be charged with the photographs found in the course of the investigations because they were not sent through the mails and that the photographs which were actually sent are not obscene because nudity as such is not obscene.

We think there was substantial evidence on the administrative record to support the conclusion that these magazines were intended for homosexuals. Overlooking the testimony that Herman Womack (the owner of two of the magazines and the publisher of all three) actually admitted such intent, the expert testimony as to the effect of the published pictures on homosexuals coupled with the obvious lack of relationship of the "posing straps," heavy boots, helmets, swords, and chains to any interest in body-building, we think, amply supports the inference that these pictures were deliberately published because of their effect upon homosexuals.

Appellants contend that even if these pictures do arouse prurient interests in homosexuals, they are not obscene within the definition of Roth v. United States, 354 U.S. 476 (1957), the so-called "average person in the community" test. It seems to us that the real meaning of Roth is that the object in question is not to be considered in terms of the reaction of an isolated atypical consumer. A case of obscenity thus is not to be predicated on the reaction of the peculiarly prudish or susceptible, and neither is a defense to such a charge to be predicated on the lack of reaction on the part of the peculiarly jaded. On the basis of the evidence

before the administrative body, we think that "the average member of the community" would be an atypical reader of these magazines. The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual. The finding that these magazines were obscene within the meaning of the statute is therefore affirmed.

The testimony of the postal inspector as to his experience in the progressive nature of the material sent through the mails by the advertisers, together with the photographs actually so sent and those seized at the same studios, we think, furnishes substantial evidence for the conclusion that the advertisements in these magazines did give information with respect to where, how and from whom obscene matter could be obtained. The foregoing omits consideration of whether the photographs actually sent through the mails were obscene. A prior decision of this court has held such matter to be obscene. See Womack v. United States, No. 15,749 ___ U.S. App. D.C. ___, ___ F2d ___ (decided Jan. 12, 1961). This finding of the administrative body is likewise affirmed.

The judgment of the District Court is therefore

Affirmed.

FAHY, **Circuit Judge**, **concurs** in the result.

STATUTES

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 UNITED STATES CODE

§ 1461. Mailing obscene or crime-inciting matter.

Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and —

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing —

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or

knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. (June 25, 1948 ch. 645, §1, 62 Stat. 768, eff. Sept. 1, 1948.)